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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 649[redacted].

MANUEL SILVAS,
Petitioner,

vs.

THE STATE OF ARIZONA,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Arizona Supreme Court is entitled State of Arizona, Appellee v. Manuel Silvas, Appellant, No. 1175. It is reported in 372 P.2d 718 and 91 Ariz. 386.

JURISDICTION

The opinion below was delivered by the Arizona Supreme Court on June 27, 1962. A motion for rehearing was filed on July 11, 1962 and denied on July 13, 1962. The order affirming judgment was entered in the minutes of the Arizona Supreme Court and a certified copy thereof with a copy of the opinion was transmitted to the Clerk of the Pinal County Superior Court, from which the appeal was taken, on July 13, 1962, and was filed therein on July 16, 1962.

A Motion for Leave to File a Second Petition for Rehearing was filed on August 30, 1962. The motion was denied on October 30, 1962.

The Petition for Writ of Certiorari was filed on this Court on December 10, 1962. There had been no order granting an extension of time within which to file the petition.

STATEMENT OF THE CASE

The petitioner was convicted of the first degree murder of his paramour. We must take issue with petitioner's statement of facts. There was evidence that petitioner had been drinking, but not that he was "hopelessly" or "incoherently" drunk at the time of the murder. It was admitted that he had fired all the shots involved. Further, neither doctor testified that petitioner was incompetent to be tried. The facts are more clearly reported in the opinion of the court below, 372 P.2d 718, 91 Ariz. 386, a copy of which is appended to the Petition for Writ of Certiorari.

Upon appeal, petitioner contended that the trial court erred in determining that he was able to understand the proceedings and assist in his defense and that the trial court erred in denying his motion for new trial made upon the claim that a juror had been incapacitated during the trial. He contended that these rulings were violations of Arizona Rules of Criminal Procedure 250 and 219.

The Arizona Supreme Court upheld the trial court and affirmed the conviction, holding that the juror was competent at the time of the trial and that petitioner was able to understand the proceedings and assist in his defense. In his Motion for Rehearing, petitioner contended for the first time that the claimed error in the rulings of the trial court constituted a denial of due process under the United States Constitution. The motion was denied, without opinion.

QUESTIONS PRESENTED

Petitioner states that the questions presented for review by this Court are:

"1. Whether due process of law under the Fourteenth Amendment of the Constitution is denied where, in a State criminal proceeding in which a unanimous verdict of twelve is required by State law, one of the jurors becomes mentally incompetent in the course of the trial and the juror is thereupon rendered incompetent to carry out the functions of the jury position?

"2. Whether under the due process clause of the Fourteenth Amendment a person may be tried and sentenced to death

where, by virtue of his mental condition, he is unwilling to assist the defense in the preparation and presentation of the case?"

THE PETITION SHOULD BE DENIED

Respondent respectfully submits that the United States Supreme Court should refuse to take jurisdiction of the Petition for Writ of Certiorari for the reasons that:

(1) The petition was not filed within 90 days after the entry of the judgment of the state court, as is required by Rule 22 (1.) of the Rules of the Supreme Court.

(2) The federal questions sought to be reviewed by Questions 1 and 2, above quoted, were not timely or properly raised in the court below.

(3) Question 1, above quoted, was answered on the facts and disposed of on state grounds; the alleged federal question was not decided by the state court.

(4) Question 2, above quoted, does not present a federal question of substance.

(1) PETITION NOT FILED WITHIN 90 DAYS AFTER ENTRY OF JUDGMENT

Rule 22 (1.) of the Rules of the Supreme Court provides that a Petition for Writ of Certiorari to review the judgment of a state court of last resort in a criminal case must be filed within 90 days after entry of such judgment, unless an extension is granted. No extension was requested or granted in the instant case.

It is well settled that a timely motion for rehearing will toll the time for filing the petition until the motion for rehearing has been decided. The Rules of the Arizona Supreme Court provide for this. Rule 9, on civil appeals, provides that a motion for rehearing may be filed within 15 days after the clerk has given notice of the decision of the court. Rule 14, on civil appeals, provides that a mandate to the trial court will issue 15 days after notice of filing of the opinion of the court, unless a motion for rehearing has been made, in which case the mandate shall not issue until the motion is disposed of. Rule 15 provides that the rules on civil appeals shall apply to criminal appeals insofar

as practicable. Rule 23, on criminal appeals, provides that:

> "When the decision of this court has been filed and an appropriate summary thereof entered on the minutes, and a motion for rehearing, if any, disposed of, a certified copy of the minute entry and a copy of the decision shall be transmitted to the clerk of the court from which the appeal was taken and shall be filed therein."

Arizona Revised Statutes § 13-1720 provides that:

> "After a certified copy of the minute entry and a copy of the decision of the supreme court in a criminal appeal has been remitted to the trial court from which the appeal was taken, the supreme court shall have no further jurisdiction of the appeal, or of the proceedings thereon. All orders which may be necessary to carry the decision of the supreme court into effect shall be made by the court to which the copy of the minute entry and decision is remitted, except when a judgment or sentence of death has been affirmed on appeal after the time appointed for the execution of the sentence and the supreme court has fixed a new time for execution and issued a warrant to the superintendent of the state prison directing him to execute the sentence at the time designated in the warrant."

The opinion of the Arizona Supreme Court was handed down on June 27, 1962. A motion for rehearing was timely filed on July 11, 1962, and denied on July 13, 1962. On that date the Arizona Supreme Court also entered the order affirming judgment in its minutes and transmitted a certified copy of the minute entry and a copy of the decision to the clerk of the court from which the appeal was taken, pursuant to its Rule 23. They were filed in that court on July 16, 1962.

The judgment of the Arizona Supreme Court was entered and it was final on July 13, 1962. On that date the court issued a new warrant of execution, as provided by its Rule 22 (d) and A.R.S. § 13-1720, above quoted, when a judgment or sentence of death has been affirmed on appeal.

Ninety days from the entry of judgment on July 13, 1962, fell on October 11, 1962. Petitioner did not file his petition for Writ of Certiorari until December 10, 1962, some two months too late.

Petitioner's "Petition for Leave to File Second Petition for Rehearing," filed on October 30, 1962, did not affect the finality of the judgment. It was objected to on the ground that the judgment was already final and could not now be reheard. Leave to file the second motion for rehearing was denied. Further, the proposed "Motion for Second Rehearing" concerned an instruction on intent, a matter which had not been raised in either the trial or appellate court and which has no connection with the questions recited in the instant petition.

The Petition for Writ of Certiorari is not timely, having been filed some 150 days after entry of final judgment by the state court. The mere presentation of a motion for leave to file a second request for rehearing will not further suspend the time within which to file a petition for writ of certiorari. *Gypsy Oil v. Escoe*, 275 U.S. 498. Jurisdiction should be refused.

(2) FEDERAL QUESTIONS NOT TIMELY OR PROPERLY RAISED

Petitioner first raised the contention that the trial court's rulings that the juror was competent and that petitioner was able to understand the proceedings and assist in his own defense constituted a denial of due process under the Fourteenth Amendment to the United States Constitution, in his Motion for Rehearing of the decision of the state court on appeal. His appeal had theretofore been based on the contention that the rulings constituted violations of Arizona Rules of Criminal Procedure 250 and 219. The motion was denied, without opinion.

An attempt to raise a federal question after judgment, upon a motion for rehearing, comes too late, unless the court actually entertains the question and decides it. *Herndon v. Georgia*, 295 U.S. 441; *American Surety Co. v. Baldwin*, 287 U.S. 156.

Petitioner's Question 2 concerns the defendant who is "unwilling" to assist in his own defense. This question was never presented to nor decided by the state court. The question before the court was one of fact: whether or not petitioner was *able* to understand the proceedings and assist in his own defense, under

Arizona Rule of Criminal Procedure 250. In the course of affirming the trial court's finding that petitioner was in fact able, the state supreme court cited the testimony of the psychiatrists that petitioner was merely *unwilling* to assist in his defense and that this unwillingness was under his control. Petitioner made no contention that an unwilling defendant could not be tried and no further question was raised or considered.

Since the alleged federal questions were not timely or properly raised, jurisdiction should be refused.

(3) QUESTION 1 WAS DETERMINED ON A NONFEDERAL GROUND IN STATE COURT

Petitioner's Question 1 is concerned with a mentally incompetent juror. The state court held that the juror was not in fact incompetent, pointing out that her fellow jurors testified that there was absolutely no evidence of her later hysterical reaction during either the trial or the deliberations. The thoroughness and the extent of the inquiry are clearly set out in the opinion of the court below.

Since the state court decided the question on the nonfederal ground of competency, as a fact, the alleged federal question of the effect of an incompetent juror was never reached. This Court has repeatedly stated that it will not take jurisdiction of a question that was or might have been decided by the state court on a sufficient nonfederal ground. *Durley v. Mayo*, 351 U.S. 277; *Stembridge v. Georgia*, 343 U.S. 541; *Young v. Ragan*, 337 U.S. 235; *Dixon v. Duffey*, 344 U.S. 143; *Buck v. California*, 343 U.S. 99. Jurisdiction should be refused.

(4) QUESTION 2 DOES NOT PRESENT A FEDERAL QUESTION OF SUBSTANCE

Petitioner raises the question whether one who is unwilling to assist in the preparation and defense of his case may be tried and convicted.

The evidence herein showed that both examining psychiatrists found that petitioner was able to understand the proceedings and

that he was able to assist in his defense. They stated that he was merely unwilling to assist and that this unwillingness was within his control. Their testimony is set out in the opinion of the court below.

This does not present a federal question of substance. If a man chooses to refuse to assist counsel in his own defense, his unwillingness would not present a constitutional barrier to his being tried. Jurisdiction to review this purported question should be refused.

CONCLUSION

For the reasons stated, respondent submits that this Court lacks and should not take jurisdiction over the questions presented by petitioner.

We respectfully urge that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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